LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 10 1955
HARLEY, Clerk

Supreme Court of the United States

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, ET AL.,

Appellants,

VERSUS

LEE OPTICAL OF OKLAHOMA, INC., a corporation, ET AL.,

Respondents.

No. 184

LEE OPTICAL OF OKLAHOMA, INC., a corporation, ET AL.,

Appellants,

VERSUS

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, ET AL.,

Respondents.

No. 185

AMICUS CURIAE BRIEF OF J. P. COLEMAN, ATTORNEY GENERAL OF MISSISSIPPI

J. P. COLEMAN,
Attorney General of Mississippi,

RICHARD A. BILLUPS, JR.,
Special Assistant Attorney General,
Jackson, Mississippi.

JANUARY, 1955.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2969

INDEX

	PAGE
I. Interest of Amicus Curiae	2
II. Summary of Argument	2
Argument and Authorities	3
General Statement	3
Authority:	
Busch Jewelry Co. et al. v. State Board of Optometry (Miss.), 62 So. 2d 770	30
Busch Jewelry Co. et al. v. State Board of Optometry, 74 S. Ct. 34	4, 33
Capitol Optical Co. et al. v. State Board of Optometry, (Miss.), 70 So. 2d 15	33
Martin v. Baldy, 249 Pa. 253, 94 A. 1091	10
Sears Roebuck & Co. et al. v. State Board of Optometry (Miss.), 57 So. 2d 726	12
Conclusion	36

Supreme Court of the United States

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, ET AL.,

Appellants,

VERSUS

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as DOUGLAS OPTICAL; and ORAN RIPS,

Respondents.

No. 184

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, doing business as DOUGLAS OPTICAL; and ORAN RIPS,

Appellants,

VERSUS

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; GRANVILLE SCANLAND, County Attorney of Oklahoma County, Oklahoma; ROBERT L. WHEELER, County Attorney of Tulsa County, Oklahoma, ET AL.,

Respondents.

No. 185

AMICUS CURIAE BRIEF OF J. P. COLEMAN, ATTORNEY GENERAL OF MISSISSIPPI

I

INTEREST OF AMICUS CURIAE

The Attorney General of Mississippi joins the Attorney General of Oklahoma in urging the constitutionality of House Bill 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, page 271, Oklahoma Session Laws 1953; 59 Okl. St. Ann. § § 941-947), relating to visual care because the questions presented for determination vitally affect the public health and welfare of the people of Mississippi. Notwithstanding several adverse decisions by the Supreme Court of Mississippi, some of those identified and interested as plaintiffs in the court below, recently came into and are now operating in Mississippi.

II

SUMMARY OF ARGUMENT

The Attorney General of Mississippi, on behalf of the State of Mississippi, urges, with the utmost vigor, that the furnishing of corrective eyeglasses to the public involves the public health and welfare and that all provisions of House Bill 953, as enacted by the Oklahoma Legislature, were in the valid exercise of the police power

of the State. That all sections are valid enactments under the police power of the State of Oklahoma in the interest of the public health and welfare under principles of law announced by this Court and many state courts, as shown by the citations in the brief of the Attorney General of Oklahoma which are adopted herein by reference.

We further urge that the prohibition against leasing space in a retail merchandising store to one purporting to do eye examinations is a valid exercise of the police power by the State of Oklahoma and closes an avenue by which those who would commercialize the professions dedicated to the protection and preservation of the eyesight of the people of this country, could engage in the practice of these professions unlawfully and to the detriment of the public health and welfare as three times held by the Supreme Court of Mississippi.

ARGUMENT AND AUTHORITIES

GENERAL STATEMENT

While the Attorney General of Mississippi joins the Attorney General of Oklahoma in urging favorable consideration, by this Court, of all three propositions presented in his brief on behalf of appellants and joins in his request for relief as respondents, we will not burden the Court with further citations and argument on Propositions I and II as they are well presented and argued. This brief will be, therefore, generally in support of

Propositions I and II and more particularly in support of Proposition III because, in the past three years, the Mississippi Supreme Court has been called upon, in three separate cases, by three separate companies, to approve and condone corporate practice by permitting a corporation to employ a physician or optometrist, or lease them space in their store, for the purpose of examining eyes to further sales of eyeglasses by the corporation, and each time the Mississippi Supreme Court has condemned such practice as detrimental to the public health and welfare of the people of Mississippi. In one of these cases *certiorari* to this Honorable Court was denied on October 12, 1953 (*Busch Jewelry Company, a Corporation*, and *Dr. F. M. Dooley* v. *the State Board of Optometry*, 74 S. Ct. 34).

We believe it will be helpful, in passing on the questions presented in these appeals, to give something of the historical growth and development of the profession of optometry in the visual care field.

Next to life itself, God's most precious gift is sight. To the care of this great gift of vision the profession of optometry has sincerely and faithfully dedicated its services.

The optometrist specializes in the examination of the eyes and in the protection and improvement of vision. He makes a complete visual analysis to determine the visual efficiency at distance and at near. When visual inef-

ficiencies are found he prescribes and provides any lenses or visual training needed for comfortable and efficient seeing.

The optometrist does not treat eye conditions requiring medicine or surgery. He is trained to detect and recognize diseases in the eye, and when present, he refers the patient for other professional care. Ophthalmologists and oculists are physicians who specialize in the medical and surgical care of the eyes. An optician fills prescriptions for glasses. He serves the optometrist, ophthalmologist, and oculist in the same manner as a pharmacist serves the physician.

The present-day optometrist obtains a highly specialized college education of four years or more. He must graduate from one of the nine schools of optometry accredited by the Council on Education and Professional Guidance of the American Optometric Association. The average tuition cost of an optometric education is approximately $2,000.00 (not including board and lodging).

The optometrist is thoroughly trained in biology, chemistry, bacteriology, human anatomy, physiology, physiologic optics, general pathology, ocular pathology, physics, mathematics, geometrical optics, mechanical optics, theoretical optometry, practical optometry, analytical analysis, psychology, psychology of vision, visual training, perimetry, and contact lenses. He is also trained

in the fields of industrial vision, vision for school children and in subnormal vision (telescopic lenses).

Upon graduation and before obtaining a license to practice, the optometrist must pass a comprehensive examination given by the State Board of Optometry in the state in which he expects to practice. State board examinations are required in every state of the union and in the District of Columbia.

The roots of the profession of optometry are deeply imbedded in over 2,000 years of scientific achievement. A list of the contributions of modern-day optometry would include most of the great men who have made scientific history.

For purposes of brevity the history of optometry is usually traced from the early mathematicians, physicians, and astronomers. Kepler (1571-1630) discovered that the human eye has a "yellow spot" which enables it to see detail; that farsighted people are helped by convex lenses, but that nearsighted people require concave lenses. Sir Isaac Newton (1642-1727) expounded the mathematical laws of light. Until the early 19th century progress in visual care was slow because knowledge of eye structure and optical abnormalities were lacking. Old-age farsightedness and nearsightedness were the only visual deficiencies corrected. In 1784 Benjamin Franklin invented bifocal spectacles.

In 1801 a physicist, Sir Thomas Young, detected and described astigmatism. Sir George Airy, an astrono-

mer, succeeded in 1827 in correcting astigmatism with a cylinderical lense. Other great men who added to the fundamental structure of optical science include Galileo, Scheiner, Snell, Huygens, Descartes, Barrow, Leeuwenhoek, Hall, Dollond, Snellen, Gauss, Helmholtz, Prentice and many others.

In the decade from 1850 to 1860 Abbe developed a system of uniform curves and introduced a formula for controlling the density of glass. The development of optometry went for the most part, hand in hand with the progress of lenses and optical instruments, and the history of optometry is so interwoven with these inventions that it is not possible to separate them.

It was in the United States that the merger of all these ideas, theories and inventions took place. Out of this accumulated knowledge and background the profession of optometry slowly evolved. As early as 1783 in America spectacles were sold in shops as merchandise. They were so expensive that the ordinary person could not afford them until a lense-grinding machine was invented to replace the costly hand-grinding. A variety of lenses in different frames was available and the patient tried them on until he found one through which he could see best. After a while these glasses were classified according to their focal strength. Later an assortment of lenses of various strengths was arranged so that they could fit in a trial frame on the patient's face. This was the crude

beginning of refraction (eye examination to determine necessary corrective lenses).

The next step occurred when the men who sold these glasses began to help people in the selection of lenses which would give them the clearest vision. These men became known as sight testing opticians. Many of these men became so seriously interested in the problems they encountered in trying to help others to see better that they did study and research in the fields of optics and the correction of human vision. In 1900 a group of them banded together and formed the American Optical Association. In 1903 they adopted a new and more exact name, the American Optometric Association, and designated themselves as optometrists.

Up to 1900 there were no laws regulating the prescription of glasses, and as the industrial and cultural development of the nation brought about a great demand for lenses, many unqualified people took advantage of this situation. In 1901 Minnesota was the first state to license and regulate the practice of optometry by law. In 1924 all the states, territories, and possessions of the United States had passed optometry laws. Optometry is also now regulated by law in Canada and some foreign countries.

Following the formation of the American Optometric Association in 1903, the various states and territories of the United States set up their own optometric

associations—all affiliated with the American Optometric Association. Later the American Optometric Foundation was formed. This foundation is an instrument of the American Optometric Association—receiving grants, carrying on research, providing student aid and scholarships, and promoting professional advancement. Through the years since 1903 it has been the policy of the American Optometric Association to share with every optometrist, ophthalomogist, and oculist the latest and most advanced knowledge resulting from experience and research.

Although the profession of optometry is rooted in antiquity, its modern development has taken place in the last 50 years. The growth of optometry has been phenomenal. Never before has a major profession developed and achieved public acceptance in so short a life span. Today there are over 16,000 optometrists in the United States. They are doing more than 75% of all the eye examinations, lens prescriptions, and visual training.

And so from a very humble origin a great new profession was born. Present day examination of the eyes by optometrists is divided into more than twenty-five tests. These tests range from simple visual acuity measurements, for which there are no less than six different types of apparatus, up to precision measurement of corneal curvature, lens defects, accommodative amplitude, muscular balance or imbalance, stereoscopic faculty, light

sensitivity of the retina, extent of visual fields, and the determination of the amount of illumination necessary for various tasks.

"The examination of eyes and the prescribing of glasses by optometrists goes back to ancient time. In the case of *Martin* v. *Baldy* (1915), 249 Pa. 253, 94 A. 1091, the Supreme Court of Pennsylvania has the following to say about optometry: 'It appears from the proofs that the business of or profession of optometry is one of ancient standing. Until a comparatively recent date, a large part of that which is done by optometrists was exclusively within their province, and was not covered in practice by the efforts of the physician or surgeon. Within the last quarter of a century or thereabouts, it appears from the proofs that among those who are engaged in the making of lenses to correct or cure defects in eyes, there has arisen a classification or division, whereby some who make lenses confine themselves entirely to the work of making them in accordance with prescriptions given by physicians or oculists. These call themselves or are known as 'opticians'; others, who still manufacture the lenses, either according to their own judgment or the prescription of physicians, do not confine themselves to the making of lenses, but also examine the eyes for the purpose of ascertaining whether there are such defects visible as can be corrected by the application of lenses. This class have taken the name of 'optometrists', and

that is the name by which they are now generally known. Those who practice under the latter title are many in number, and they are recognized in many states of the Union as a class by themselves and regulated by statute. The ophthalmologist is the physician who specializes in diseases of the eye."

"The National Society for the prevention of Blindness was waging an intensive educational campaign during the month of September, 1950. The object: To teach the public that proper care and periodic examinations could save the vision of at least half of the estimated 22,-100 Americans who will go blind during the year 1950. Ironically, medical progress has posed a major problem for sight-savers. Increased longevity subjects more adults to blinding diseases that strike late in life. Some 800,000 persons, for example, slowly are going blind from glaucoma (internal pressure in the eyeball) and do not know it. If caught early by examination, the disease can be checked and remaining sight saved. Their figures show that some 4,500 cases of infectious diseases of the eyes which will cause blindness in 1950, 3,500 are preventable. Of the 3,500 cases of glaucoma which will cause blindness in 1950, almost 2,000 of these are preventable. Of the 6,500 cases of cataract which will cause blindness in 1950, some 3,500 are preventable. Of the 7,000 cases of all other causes which will result in blindness in 1950, 2,500 of such cases are preventable."

Percentage of Age Groups Needing Classes

Of persons 15 years of age or less	23%
Of persons 30 years of age	39%
Of persons 40 years of age	48%
Of persons 50 years of age	71%
Of persons 60 years of age	82%
Of persons over 60 years of age	95%

And all ages combined who need glasses—
Six out of ten!

Eye glasses are not a commodity. *They have no value other than to the person for whom they were prescribed.*

> "The Provisions of Section 4 of the Act, prohibiting the corporate practice of Ophthalmology and Optometry in Oklahoma, are valid enactments under the Police Power of the State in the interest of public health and welfare."

The first case to reach the Supreme Court of Mississippi on this question was the case of *Sears Roebuck & Co. et al.* v. *State Board of Optometry* (57 So. 2d 726) decided March 17, 1952. Just prior to the filing of this injunction suit in Chancery Court but after charges to revoke the license of the optometrist had been filed, the optometrist in the optical department at Sears Roebuck & Co. was on a straight salary of $400.00 per month. Later, and before trial, the parties entered into an elaborate lease-rental arrangement with the execution of numerous leases and agreements in an attempt to show the optometrist as maintaining his own practice separate from the optical business of the company. Concerning all

this the learned chancellor had the following to say in his written opinion when the case was decided and an injunction issued:

> "The weight of modern authority is against such arrangements as we have here, and the question presented is whether the optometrist is working for the defendant companies as an employee, or for himself as a licensed and independent practitioner.
>
> "It is only in the latter capacity that his status could be legal and his license authoritative in professional relation and service to the public.
>
> "The statutory edifice, relating to and regulating optometry in the State of Mississippi, excludes all that it does not include, and merchants and druggists are authorized only to sell and assist purchasers in fitting spectacles and eyeglasses over the counter, and in their place of business at the time of sale.
>
> "They are not permitted to hire an optometrist with his license as a screen to hide them from the law while they commercialize the profession, and use him as a handy man to fit and sell glasses as merchandise. In this position the optometrist would be acting as a clerk or salesman, and the employer would in effect be practicing the profession without a license.
>
> "The law contemplates that the controlling principle in the use of the State's franchise will be the eye of the patient, and its preservation, and not the eye of the employer in its scrutiny and search for profit.
>
> "In other words, the *conscience* of the practitioner should guide him in his service, and not the company's cash register where the sales are rung up.
>
> "Professional responsibility and the public welfare demand that the human eye, above all things,

be held sacred, and in no sense an object of commerce in routine traffic of equipment purporting to be for its benefit.

"It is not thinkable that the State, after a scientific and studied examination of the applicant, would issue him a license, over its Great Seal, to go out and tamper with the human eye as with a commodity in the market place, and the wares which merchants buy.

"And when we think of the children, in increasing numbers, who are helpless in submission to this procedure when their sight is at stake, we lose patience with everything except fidelity to duty, and the highest altruism in providing what Nature requires in such delicate and vital situations.

"Surely an optometrist should be absolutely independent of everything and everybody except his profession, and the people who confidently depend upon him to aid them in improving and preserving their sight.

"It is alleged in defense that the optometrist in this case is not an employee, but is a lessee or tenant of Sears, and

"Second, that optometry is not a profession, but a trade.

"Copies of alleged leases, sub-leases and correspondence agreements were introduced in evidence to show that the optometrist rents a small space at the Sears' store for $200.00 a month, and in turn subrents a part of this space to the Louisiana corporation for $600.00 a month, giving the optometrist a net take of $400.00 a month at the very outset.

"The Louisiana corporation is the third party to this triangle, and its business is supplying the glasses which the optometrist sells.

"There are other features of these complicated contracts, with their intricate and interlocking arrangements, that are too involved for comment, and which for the present might be passed over.

"I am of the opinion, from the evidence, that the optometrist is not renting working space as a tenant in the Sears Roebuck establishment, but is simply occupying it as an employee or clerk, and that the four hundred-dollar net income from the sublease is his assured salary, plus such additional amounts as may have been agreed upon.

"This is the only reasonable view that the circumstances present, unless we assume that the great Sears chain enterprise has gone into the landlord and tenant business to help defray expenses, or increase its income from sales of its vast variety and volume of merchandise.

"If the optometrist is a *mere mechanic* as contended, he may be employed by any person or corporation as any other mechanic is employed. But if his work transcends simple mechanical processes, to the extent that it is a profession or learned avocation, and licensed only after examination to test the scope and sufficiency of this learning, then he is not a mere mechanic, and may not be so employed.

"The Mississippi statutes, like the statutes now of practically all the states in our Union, make optometry a learned profession, within the English meaning and definition of that term.

"In this view, and with that intent, a whole chapter in our Code of 1942 defining, authorizing, regulating and licensing the practice of optometry has been enacted into law, and set up by the Legislature in this State.

"Section 8832 provides that,

" 'The practice of optometry is defined to be the application of optical principles, through technical

methods and devices in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers, and adapting optical accessories for the aid thereof.'

"And Section 8840 states that,

" 'Any person over the age of 21 years, of good moral character, and who has graduated from high school or preparatory school affiliated with and recognized by a State University and who has graduated from a reputable school or college of optometry, maintaining a two-year course in optometry, each session seven months in length, and offering a course or standard equivalent to that required by the Federal Board of Vocational Training, shall be entitled to stand the examination for license to practice optometry in Mississippi. The examining Board of Optometry shall keep on file a list of schools or colleges of optometry which are recognized by said Board, and which give a course in optometry equivalent to the requirements or standards heretofore specified. The examination to practice optometry shall consist of tests in practical, theoretical, and physiological optics, in theoretical and practical optometry, and in anatomy and physiology of the eyes, and in pathology as applied to optometry.'

"Surely there is something more than a mere mechanic in those statutes.

"I am a pretty good mechanic myself, but I could not qualify as an optometrist.

"An oculist or ophthalmologist is an eye doctor, or specialist, and he may treat the eye with medicine or surgery.

"An optician is a person who grinds the lenses and makes the glasses, according to the prescription of the optometrist, but he is not necessarily nor usually an optometrist.

"In other words, this optometry business, in modern law, and by modern standards, is a highly specialized calling, and in some states a four-year college course is required to complete the study.

"That the physical laws of optics and optometry are strictly mechanical is exactly true. And it is likewise true that everything in the whole system of Nature is mechanical. They all derive from mechanical forces and mathematical principles, but it takes something more than a mechanic or mathematician to apply and interpret them.

"The angles of incidence and reflection and retraction are always the same. The principles of polarization, diffraction, and diffusion of light never change. The spectrum arrangement and order of colors in prismatic effect are forever alike. The same is true of all physical laws, but the eye itself is different and varied in every human being on the earth.

"The organic structure and function of the human eye, with its incessant modifications and changes, and the infinite variety of form and focus and fitness, presents the resulting sight as the one transcendent mystery of created things. I look out there and see each of you as definitely different and distinct personalities. And you see me, but no one knows why. We know the effect but not the cause, the objective and empirical phenomena, but not the subjective and spiritual realities that make them work.

"And this strange organ has its own peculiar pathology. It is subject to disease and disorder and deformity in many explicable ways, and unknown tendencies. It is not a thing for a mechanic to monkey with, either in fitting it with glasses, or in stimulating it with medicine.

"Sir Isaac Newton, whose experiments with light are the foundation of modern optics, was good

at making lenses for spectacles and telescopes, but he was not an optometrist. It was he who discovered and described the law of gravitation, the binominal theorem, the integral and differential calculus, the necessary action of all the forces of elemental and universal nature, and in fine the mechanical and mathematical principles of natural philosophy. But he was not an optometrist. He knew his mechanics and his mathematics, but he did not know his eye.

"Joseph Fraunhofer, the Bavarian physicist, who contributed much to the science of optics in his study of light, and Nickolaus Hartsoecker, the Dutch philosopher, were both noted opticians, but they were not optometrists.

"In their time the profession was undeveloped, and its importance as a scientific service not understood. This was true of the whole field of scientific knowledge, and especially true of the more improved methods of preserving the human body, and conserving the general health of mankind.

"The reason for the old law which permitted and still permits the sale of spectacles over the counter by merchants and druggists is obvious.

"It extended a cheap and convenient aid to persons unable at the time to invest in more expensive equipment, and it had the merit of enabling the purchasers to select their own glasses, and to fit them to suit themselves.

"It was a boon to the old and weak and poor of all races in threading needles, glancing at the local news in the small town weekly, and reading the Word at twilight that came from the prophets of long ago.

"The advent of the optometrist, and the increasing need for his services in this competitive and complex age, makes it of extreme importance that he measure up to all the requirements, and serve his

patrons to the best of his ability, and in the spirit and purpose of the law that approves him as worthy of his profession, and of the franchise granted him to practice it.

"The injunction should issue."

The corporations appealed from this adverse decision of the Chancery Court to the Mississippi Supreme Court (*Sears Roebuck & Co.* v. *State Board of Optometry, supra*), and in affirming the injunction issued by the lower court, the Supreme Court had the following to say:

"At various times in 1950 Sears ran advertisements in the Jackson newspapers. They were billed to and paid by Sears, who later charged their costs to Craftsman. They were run under the name of 'Optical Department, Sears, Roebuck and Company.' One typical advertisement welcomed the public to Sears' new optical department where the public would receive 'a thorough eye examination by a registered optometrist, visual analysis * * * glasses compounded,' etc. In one corner of the advertising was printed the following: 'Dr. C. S. McAlister, Registered Optometrist in Charge. Full time office at the Optical Dept. Long experienced in practice of examining eyes for glasses in Mississippi. Dr. Carey S. McAlister personally invites you to come in for a visit at your convenience.' Since January 18, 1951, Sears has published no advertisements of the optical department. Dr. McAlister has run them individually. Several pictures of the space leased by Sears to McAlister and subleased by McAlister to Craftsman appear in the record. One of those photographs indicates that McAlister's office and the optical dispensary are very close to the men's clothing department and other quarters in the Sears' store contain-

ing general merchandise, and that they are physically integrated with the other merchandising parts of the store.

"Only two witnesses testified, and both of them were presented by appellee, complainant below, State Board of Optometry. The first witness was Miss Katherine Hornsby. On December 4, 1950, Miss Hornsby was working as a Secretary for the attorney for the appellee Board. At his request, she went to the optical department at Sears, and advised Dr. McAlister that she needed some glasses. She then said: 'He examined my eyes and told me I had a slight defect there and he thought glasses might correct it. He wrote the prescription and I asked him if he would give me the prescription and let me think about getting the glasses and take it home with me. He said he couldn't give me the prescription but he wrote it out on a little piece of paper.' She stated that McAlister said that he could not give her the prescription which he had written, but upon her insistence he finally handed her a piece of paper purporting to be a prescription. It apparently was written on the back of a torn check. It contained her name, but not the doctor's name, and had some letters and figures on it. She later returned to Dr. McAlister, when he showed her some frames and measured her head for them. She paid him $31.78 for the glasses, and he gave her a receipt for that payment evidenced by a Sears' sales ticket. She tried to wear the glasses but they caused a blur and gave her a headache. With reference to whether McAlister charged a fee for his services, Miss Hornsby said that he told her there would be no fee, that he felt that if she had the prescription filled, she would let them do it. And the sales ticket reflects only a charge for the glasses.

"The other witness for complainant was Dr. C. R. Von Seutter, a registered optometrist practicing in Jackson. He examined Miss Hornsby's eyes, but

the court excluded his testimony, which appellee stated would be that in fact Miss Hornsby did not need glasses of any kind at the time McAlister sold them to her.

"The chancery court in its final decree enjoined Sears and Craftsman from the practice of optometry 'directly or indirectly, and from employing, by any means, registered optometrists or physicians and surgeons to examine the eyes of their customers and prescribe eye glasses in the State of Mississippi.'

"(1) We think that the Optometry Act has the effect of prohibiting a corporation from practicing optometry through a licensed employee. This appears to be the legislative purpose. And this conclusion is in accord with the substantial weight of authority from other states as well. 13 Am. Jur., Corporations, § 837, summarizes the rule: 'It is generally held that in the absence of express statutory authority a corporation may not engage in the practice of optometry either directly or indirectly through the employment of a duly registered optometrist.' See also 41 Am. Jur., Physicians and Surgeons, § 28; 19 C. J. S., Corporations, § 956, pages 411-412; 70 C. J. S., Physicians and Surgeons, § 10, pages 843-844.

"The statute requires a practitioner of optometry to be a 'person,' who is over 21 years of age, of good moral character, who has graduated from a reputable school of optometry, maintaining a two-year course, and who has passed the required examination. It is apparent that no corporation is entitled to be registered and to practice optometry through employees under these requirements. Other courts have reached this same result. In *State ex rel. Beck* v. *Goldman Jewelry Company*, (1935), 142 Kan. 881, 51 P. 2d 995, 102 A. L. R. 334, the Kansas statute was similar in many respects to the Mississippi act, and the Court so held.

"The statute in *Funk Jewelry Co.* v. *State ex rel. La Prade*, (1935), 46 Ariz. 348, 50 P. 2d 945, established similar requirements as to who was entitled to practice optometry: He must be over 21 years of age, of good moral character, etc. The Court said: 'The qualifications of an optometrist, as thus outlined, of course exclude a corporation from the practice. It cannot qualify and cannot obtain a certificate of registration. It is not of the class of persons the Legislature intended to authorize to practice optometry. It does not possess the necessary moral and intellectual qualities.'

" '(3, 4) The rationale of the foregoing corporate prohibition is closely related to the legislative purpose and power of designating optometry as a profession. This clarifies the constitutional validity of the Mississippi statutes based upon the police power of the State. And the great weight of authority holds that the Legislature has the power to define optometry as a profession and to regulate it as such. Anno., 98 A. L. R. 905. Some of the many cases holding that a Legislature has validly classified optometry as a profession for regulatory purposes are *State ex rel. Loser* v. *National Optical Stores Co.*, (1945), 189 Tenn. 433, 225 S. W. 2d 263; *State ex rel. Sisemore* v. *Standard Optical Co. of Oregon*, (1947), 182 Or. 452, 188 P. 2d 309; *Kendall* v. *Beiling*, (1943), 295 Ky. 782, 175 S. W. 2d 489; *State ex rel. Standard Optical Co.* v. *Superior Court*, (1943), 17 Wash. 2d 323, 135 P. 2d 839; *Neill* v. *Gimble Bros., Inc.*, (1938), 330 Pa. 213, 199 A. 178; *Funk Jewelry Co.* v. *State ex rel. La Prade*, (1935), 46 Ariz. 348, 50 P. 2d 945; *McMurdo* v. *Getter*, (1937), 298 Mass. 363, 10 N. E. 2d 139. Illustrative of these decisions is *State ex rel. Sisemore* v. *Standard Optical Co. of Oregon*, (1947), 182 Or. 452, 188 P. 2d 309, 312, in which the Court said: 'The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which

have arisen in modern times by reason of the necessity for specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine. *Cf. Semler* v. *Oregon State Board of Dental Examiners*, 148 Or. 50, 53, 34 P. 2d 311. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. The fact that the optometrist is the employee of an optical concern whose main interest is the sale of optical goods tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient'.

"(6) The remaining question is whether there is sufficient evidence in the record to support the finding of fact of the chancellor that Dr. McAlister, under his arrangements with Sears and Craftsman, is an employee of Sears and Craftsman. We think there is. The books are replete with cases analyzing attempts to evade the statutory prohibition against a corporation practicing optometry through a licensed employee. The courts carefully examine the factual relationships of the parties in order to determine whether the prohibited employer-employee relationship exists. We will not again detail the facts. Prior to the new arrangement of January, 1951, McAlister was admittedly an employee of Sears and Craftsman. After the complaint of December, 1950, had been filed against McAlister before the State Board of Optometry, the new arrangement of contractual relations between the parties was made, effective January 1, 1951. The chancellor was warranted in finding that this arrangement was an attempt to evade the statutory prohibition. It took the form of a lease of about 200 square feet from Sears to McAlister for a rent of $200 per month. On the same day McAlister subleased to Craftsman three-fourths of that space for a rental of $600 per month, giving

to McAlister an assured net income of $400 per month. Before that time he had been paid a salary of $90 per week; the new arrangement reached approximately the same result. That this arrangement was but a variation upon the prior situation and an evasion was recognized by the contract between Sears and Craftsman, by which Sears was to handle all of the accounts and bookkeeping for Craftsman and Craftsman was to pay Sears 25 percent of its gross sales, but was to obtain credit on that amount for the rental which Craftsman had to pay to McAlister for the sublease. With a minor exception, McAlister had access to his office only during the business hours of Sears' retail store. And Sears could cancel its lease on 30 days' notice. These and the other circumstances support the finding of the chancery court that in fact McAlister was practicing optometry as an employee of Sears and Craftsman. It is true that McAlister's lease from Sears authorized him to charge a $3 fee for each patient, and that he had a sign in his office to that effect. Miss Hornsby testified that in December, 1950, he refused to charge her a fee, but there was no proof under the January, 1951 arrangement McAlister was not charging a separate fee. Yet whether he did or not is simply one circumstance out of many relevant to the major issue of whether McAlister was in fact an employee of Sears and Craftsman.

"In *State ex rel. Beck* v. *Goldman Jewelry Co.*, (1935), 142 Kan. 881, 51 P. 2d 995, 1001, 102 A. L. R. 334, the Jewelry Company originally employed a licensed optometrist in connection with its optical dispensary, but after protest was made, the defendant company changed its method of doing business and rented to Jacobs, a licensed optometrist, space in its store. Under the contract, Jacobs was to furnish each of the company's customers free optometrical examinations. Jacobs paid rent of $20 a month for his space. The company would pay Ja-

cobs $2.75 for each examination, and Jacobs also had the right to carry on his own practice at the rented location and to retain his own fees. Jacobs was to do the mechanical work of preparing glasses and to receive a commission of 10 per cent of the gross amount of each sale. Either party could terminate the contract on 10 days' notice. Under the Kansas statute, somewhat similar to that of Mississippi, the Court held that the Goldman Jewelry Company was in fact the illegal employer of Jacobs. The COURT said:

"It argues, however, that it changed its method of doing business on July 19, 1935, and that its employee is now a licensee in control of the business and that it has no control over it. A quite similar arrangement was denounced in *State* v. *Kindy Optical Co.*, *supra*, and under *Eisenmith* v. *Buhl Optical Co.*, *supra*, and our own case of *Winslow* v. *Kansas State Board of Dental Examiners*, *supra*, (115 Kan. 450, 223 P. 308), it would seem a similar conclusion should be reached here. An examination of the contract between the defendant corporation and its employee Jacobs shows the lack of Jacobs' control, for the company can dispense with his services on ten days' notice whenever it concludes he is not producing enough sales of glasses to those referred to him for tests of the eyes. It likewise shows that Jacobs has nothing to do with the prices fixed for sales of glasses, and for his own services to the customer he is paid by the company and not by the customer. There is an entire lack of the relation that ordinarily exists between a professional man and his client. The fact the contract provides that Jacobs must supply and own his examining equipment and may have patients of his own does not cure the faults above noted; the company rather offset any advantage to Jacobs thereunder by requiring him to buy supplies of it, and it requires no statement to the

contrary in the contract, to inform us that it is at prices fixed by the company.'

"In *Ritzholz* v. *Arkansas State Board of Optometry*, (1944), 206 Ark. 671, 177 S. W. 2d 410, 411, Ritholz had prior to July, 1940, employed in his optical dispensary a physician. He was paid $40 per week. A later arrangement was outlined by the court as follows: 'The salaried physician (who also maintained an independent office at 319½ Main Street) contracted with Ritholz and his associates, to rent 96 square feet of office space occupied by National, payment to be $35 per month. This contract, *prima facie*, merely creates the relationship of landlord and tenant. Affirmative expressions were used in a seeming effort to emphasize what the Ritholzes now contend to have been the purpose—that is, merely to provide convenient office quarters for the physician in order that National customers might be accommodated if on their own initiative they elected to have professional assistance in those instances where advice of an optometrist was required. The contract physician testified that he charged $1 for examinations and received a commission of 20 percent on certain sales of glasses after examinations had been made by him at his office in the adjoining block. Compensation thus realized and that received from his private practice amounted to approximately $500 per month as distinguished from the former salary of $40 per week. He did National's work exclusively.

"'We think the case is controlled by *Melton* v. *Carter*, 204 Ark. 595, 164 S. W. 2d 453. In that case constitutionality of Act 94 was upheld. It was also said that the legislative object was to prohibit employment of an optometrist by one who is not licensed. In other words, under that decision, 'a layman may not engage in the profession by employing a licensed optometrist.'

"The decree in the instant case found that the lease agreement was collusive—'a fiction for the agency that exists between the parties,' as the Chancellor expressed it. We think the testimony sustains this finding.'

"*Neill* v. *Gimbel Bros., Inc.*, (1938), 330 Pa. 213, 199 A. 178, 180, involved a somewhat similar situation. The store leased to Diamond a portion of its floor space for the operation of an optical department. The court there said that when a lease is accompanied with 'such control as is here shown, the lessee becomes the agent of defendant, and as it is forbidden to practice (optometry), it may not do so through agents.'

"In *State ex rel. Bricker* v. *Buhl Optical Co.*, (1936), 131 Ohio St. 217, 2 N. E. 2d 601, the Buhl Optical Company operated an optical dispensary and for a while employed optometrists on a salary. Later the arrangement was changed by a written contract, under which the company leased to several optometrists certain office space in its optical goods store, in consideration of the lessee referring to company patients for whom they prescribed glasses. For examinations, the optometrists agreed not to charge more than $1, which fees the optometrists alone received. The court held that this arrangement was a subterfuge and that the optical company was in effect still the employer of the optometrists and was violating the statute.

"In a later Ohio case, *Rouce* v. *Standard Drug Co.*, (1937), 132 Ohio St. 629, 9 N. E. 2d 609, 612, the Standard Drug Co. and the May Co. abandoned the method of operation which had been condemned by the court in the *Buhl Optical case*. Standard leased floor space to Adelson for an optical department. Adelson subleased a part of the space to an optometrist, with lessor's consent. The sublease was made by Adelson to Dr. Kudysh, who

charged all patients who came to him a $1 examination fee, which he retained. At the end of each week, Adelson paid to Dr. Kudysh the difference between the total he received for examination fees for that week and $60, the $60 being the guarantee given by Adelson to Kudysh. Kudysh filled out prescriptions, and informed each patient that he could go to any optician he chose, but that if he so desired Adelson could fill the prescription. Although the court refused to hold the Standard Drug Company and the May Company in contempt, since the proof did not show that they knew of or had aided in the violation of the optometry statute, it held that Adelson and Dr. Kudysh were violating the act. It said that the court 'is not limited by the terms of the lease, but will consider the manner in which the optical business was conducted and the extent to which the corporation participated in transactions involving optometrists.

" 'Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship. Where a corporation directly or indirectly engages in the practice of optometry the lease will afford no protection on a proper challenge of the illegality.'

"In *State* v. *Kindy Optical Co.*, (1933), 216 Iowa 1157, 248 N. W. 332, 335, the state sued to enjoin the defendant corporation from practicing optometry. The company operated stores distributing optical supplies. Earlier, the company had employed Jenson, a licensed optometrist, to manage its optical stores and to also serve as an optometrist therein. After the state had indicated it would take action, the company rearranged its relationship by executing to Jenson a lease of certain floor space in its store building in Des Moines. The lesser company agreed to pay Jenson $281.66 per month. All eye examina-

tions were to be under the exclusive control of lessee. On the same day by a separate contract the company employed Jenson for two years as a manager of its optical department. All monies derived from that business were to be deposited in the name of the company. The company paid Jenson a salary and certain percentages for that work. Advertisements appeared in the name of the company. The court said:

" 'The subtle attempt on the part of the defendant to evade the provisions of the Iowa statutes in reference to the practice of optometry, by employing a licensed optometrist to conduct its business, and by the execution of the alleged lease with its employee, is too patent to appeal strongly to a court of equity.'

" 'The execution of the so-called lease between the defendant and its employee Jenson, in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the statutes herein referred to. It is true that the name of the defendant did not appear publicly in connection with the business, but the record shows without controversy that the business was in fact owned and operated by the defendant company. The defendant company controlled the conduct and policies of the business. Jenson was simply its employee on a stipulated salary. The so-called lease between the defendant and Jenson, under the terms of which the defendant, as lessor, was to pay Jenson, as lessee, $281 per month, was only a clever attempt to change the character of Jenson from an employee to a lessee, and does not change the fact that Jenson was an employee of the defendant company.'

"In *Ritholz v. Com. of Virginia*, (1945), 184 Va. 339, 35 S. E. 2d 210, 219, the proprietors of an optical store furnished offices to an optometrist and

guaranteed him a minimum income. He collected a $2 fee which he retained. He would deliver prescriptions to Ritholz, owner of the optical store. The court discussed a number of cases somewhat similar to the present one, and held that the optometrist was an employee of the store within the prohibitions of the statute; that whether the customers paid a separate fee to the optometrist is not controlling; and that 'the relationship of the parties is not changed by the different methods of payment.'

"In *State ex rel. Loser* v. *National Optical Stores Co.*, (1945), 189 Tenn. 433, 225 S. W. 2d 263, 266, the store furnished optometrists with a small office inside the building and guaranteed them a fixed minimum weekly income. The optometrists charged a $2 examination fee, which they retained. The court said the activities of the optometrists and the sales of the store were so merged and combined that they constituted a single operation and enterprise' and that the device by which the defendant used the services of the doctors amounted to 'an evasion of the law and is not a *bona fide* arrangement.' See also *Kendall* v. *Beling*, (1943), 295 Ky. 782, 175 S. W. 2d 489; *State ex rel. Standard Opt. Company* v. *Superior Court*, (1943), 17 Wash. 2d 323, 135 P. 2d 839; *McMurdo* v. *Getter*, (1937), 298 Mass. 363, 10 N. E. 2d 139; Anno. 102 A. L. R. 334, 128 A. L. R. 585, 121 A. L. R. 1455, 141 A. L. R. 883, 888."

The next case, involving this question, appealed to the Mississippi Supreme Court by a corporation was that of Busch. (*Busch Jewelry Co. et al.* v. *State Board of Optometry*, 62 So. 2d 770), decided February 9, 1953. In this case, Busch Jewelry Company employed a physician to examine the eyes of their customers to further their sales of glasses. The learned chancellor in the court

below had the following to say in his written opinion in granting an injunction:

> "It is the opinion of the Court that the defendant, Dr. F. M. Dooley, is an agent and servant of the defendant, Busch Jewelry Company, and the said defendant, Busch Jewelry Company, pays his privilege license and charges him no rent.
>
> "The Court further finds that Dr. Dooley is not practicing medicine and is only a 'front' for the defendant, Busch Jewelry Company, to practice optometry. Defendant, Dr. Dooley, is 84 years of age and testified that he served as a country doctor in various and sundry places in the State of Mississippi and other states until his retirement.
>
> "It is further the opinion of the court that the defendant, Busch Jewelry Company, did not employ Dr. Dooley because of any learning or knowledge of the eye that he may have, but solely for the purpose of the practice of optometry by the defendant jewelry company. The defendant, Dr. Dooley, cannot work for the best interest of the unfortunate persons coming into the jewelry store for examination of eyes, but is working solely for the best interest of the defendant jewelry company. In order for the defendant, Dr. Dooley, to receive his pay it is necessary that he prescribe glasses to be sold to the patients by the defendant jewelry company.
>
> "An injunction is granted as prayed for in the petition."

The Mississippi Supreme Court in affirming the lower court and sustaining the injunction had the following to say:

> "Corporation, which employed retired physician at monthly salary to examine eyes of its patients and prescribe spectacles for patients whose prescriptions

were filled by corporation, would be enjoined from engaging in practice of optometry, though under statute a physician has the right to perform optometrical work. Code 1942, § § 8832 to 8846, 8923-51.

"When a physician abandons practice of medicine and unlawfully engages in practice of optometry by becoming an employee of one not authorized to practice that profession, physician is subject to injunction at instance of State Board of Optometry.

Code 1942, § § 8832 to 8846, 8923-51.

"The record shows that Busch Jewelry Company is a corporation operating several stores in Mississippi as well as numerous stores in other states. Its home office is in Birmingham, Alabama, where lenses for its optical department are ground and finished and from which point they are mailed to its local stores for delivery to customers. Dr. Dooley is 84 years of age and began the practice of medicine in 1890. After following his profession at numerous places in Mississippi and Louisiana he retired from the practice in 1936 or 1937 and later took up the fitting and prescribing of glasses for the correction of defects in vision. He is regularly employed by the company at a salary of $400 per month and devotes his entire time to the business of that company in the examination of eyes and prescribing spectacles; this is done in an office furnished to him free of rent by the company in its store at Jackson and with the use of equipment furnished him by the company. He charges no fee for examinations and his prescriptions are filled by the company. He admits that he is practicing optometry but says that he considers his work as coming under his license as a physician. The company paid privilege licenses for him both as an optometrist and as a physician.

"Our statute does not authorize a physician to unlawfully engage in the practice of optometry but merely permits him to lawfully engage in that profession on the faith of his license as a physician without requiring him to take a further examination as to his qualifications as an optometrist. When he abandons the practice of medicine and unlawfully engages in the practice of optometry by becoming an employee of one not authorized to practice that profession we think both the employer and the employee are subject to injunction at the instance of the State Board of Optometry and that the physician in such case cannot hide behind his license to practice medicine. The chancellor was justified in finding from the evidence, as he did, that Dr. Dooley is not practicing medicine but is only a 'front' for Busch Jewelry Company in unlawfully practicing optometry. By the decree appealed from Dr. Dooley was not enjoined from practicing medicine but only from unlawfully practicing optometry. He is still permitted to practice medicine or optometry on his own account in a lawful manner. The decree of the lower court is therefore affirmed."

The appellants, Busch Jewelry Company and Dr. F. M. Dooley, defendants in the court below, brought this case before this Honorable Court and on October 12, 1953, *certiorari* was denied. (*Busch Jewelry Company, a Corporation, and Dr. F. M. Dooley, petitioners, v. The State Board of Optometry*, No. 134, 74 S. Ct. 34).

Again, in the third case involving this question, the Capitol Optical Company and their physician, Dr. J. J. Savell, appealed from an injunction granted in Chancery Court to the Mississippi Supreme Court. (*Capitol Optical Company et al. v. State Board of Optometry*, 70

So. 2d 15), decided February 8, 1954. In this case the physician had a lease on space measuring some five by ten feet in the Capitol Optical Company place of business and they each contended the physician had his own separate practice independent of the company. The learned chancellor, in his decree granting an injunction had the following to say as to this:

> "The court is of the opinion that the defendant, Dr. J. J. Savell, is the agent and servant of the defendents Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company, and that said Dr. J. J. Savell is not practicing medicine but is aiding and abetting and making it possible for the defendants Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company, to practice optometry. It is further the opinion of the Court that the defendants Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company did not employ Dr. Savell because of any learning or knowledge of the eye that he might have, but solely for the purpose of the practice of optometry by the said Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company. The defendant, Dr. Savell, cannot work for the best interests of the unfortunate persons coming into the Capitol Optical Company store for examination of eyes, but is working for the best interests of defendants Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company. In order for the defendant, Dr. Savell, to receive his pay it is necessary that he prescribe glasses to be sold to the patients of the defendants, Tony Sward, R. M. Gardiner, and John Mayfield, d/b/a Capitol Optical Company."

Notwithstanding a stipulation entered into and filed in the Mississippi Supreme Court to the effect the parties

agreed that the decision in the *Busch Jewelry Company case, supra,* would be controlling in this case, the appellants insisted on presenting their appeal and in affirming the injunction granted by the lower court, the Supreme Court had the following to say:

> "Where partnership rented office space in its store to a physician authorized to practice optometry, and guaranteed a minimum weekly income, and physician spent full time during office hours prescribing eye glasses, which prescriptions were filled by partnership, partnership and physician were engaged in unlawful practice of optometry.
>
> "There is no substantial difference between the facts and controlling principles in this case and those in *Busch Jewelry Co.* v. *State Board of Optometry,* 216 Miss. 475, 62 So. 2d 770, *certiorari* denied, 346 U. S. 830, 74 S. Ct. 34, 98 L. Ed.
>
> "Capitol Optical Company is a partnership firm composed of Tony Sward, R. M. Gardiner, and John Mayfield. These partners are engaged in business in Chicago, Illinois, as a partnership under the trade name of M. G. S. Optical Service. Under that trade name they employed Dr. J. J. Savell, a licensed physician under the laws of Mississippi to work for them in prescribing eye glasses in their optical store in Jackson, Mississippi, at a salary of $104 per week. That agreement was oral. After our decision in *Sears, Roebuck & Co.* v. *State Board of Optometry,* 213 Miss. 710, 57 So. 2d 726, the parties entered into a written contract whereby the partnership rented to Dr. Savell office space in its store measuring approximately 10 feet by 5 feet for the price of $40 per month and guaranteed him a minimum income of not less than $114 per week. This contract was subject to cancellation by either party on 10 days' written notice. Dr. Savell testified that

he gives full time to the business of Capitol Optical Co. during office hours, but does some outside medical practice on his own account outside of office hours. He contends that his prescribing of eye glasses is done pursuant to his license as a physician and not as an optometrist, but the lower court adjudicated that he is unlawfully engaged in the practice of optometry as an employee of Capitol Optical Co. and enjoined him and the partnership, Capitol Optical Co., from further unlawfully practicing optometry.

"From the final decree of the chancery court an appeal was taken to this Court and the record was filed here on November 1, 1952. The appellants and appellees entered into a written stipulation duly filed in this Court to the effect that the decision in this cause will be controlled by the decision of the United States Supreme Court in the *Busch Jewelry Co. case, supra*, and agreeing that this case should be passed on this docket until the Supreme Court of the United States acted on the appeal in the *Busch case*.

"Notwithstanding this stipulation, the appellants have filed a lengthy brief raising substantially the same questions which were raised and passed upon in the *Busch case*. These questions were settled in the *Busch case*. The decree in this case does not deprive Dr. Savell from engaging in the practice of medicine in a lawful manner. It only enjoins him from practicing optometry in an unlawful manner and it is accordingly affirmed.

"Affirmed."

CONCLUSION

WHEREFORE premises considered, the Attorney General of Mississippi respectfully asks the Court to hold

that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 13, Title 59, Page 271, Oklahoma Session Laws 1953) is in its entirety a valid and constitutional statute of the State of Oklahoma; to decline to enjoin the defendant, Attorney General of Oklahoma and/or the defendants, County Attorneys of Oklahoma, from enforcing the provisions thereof; and to issue an order permanently enjoining Respondents from future violations of the provisions of said Act.

Respectfully submitted,

J. P. COLEMAN,
Attorney General of Mississippi,

RICHARD A. BILLUPS, JR.,
Special Assistant Attorney General,
Jackson, Mississippi

JANUARY, 1955